FILE COPY

FILED
JAN 2 1

In the

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE.

CHARLES C. TRABUE
Counsel for Appellee.

WILLIAM HUME,
GEO. H. ARMISTEAD, JR.,
Of Counsel.

BAIRD-WARD—NASHVILLE

INDEX.

PAGE

(1) In determining whether an appellant has been wrongfully deprived of a constitutional right, this court will not be limited to a consideration of the reasons assigned by the state court 1

(2) As to the argument that complainant, notwithstanding it invoked the 1929 Act, was surprised by the construction given the Act by the Supreme Court, and has, therefore, the right to repudiate the Act 4

(3) As to the argument that complainant could recover on and exhaust the refunding bond without prejudice to its right to sue on the contract bond 5

Table of Cases.

Aetna Life Ins. Co. v. Dunken, 266 U. S., 389 3

City of New Orleans v. New Orleans Water Works Co., 142 U. S., 79 3

Chicago R. I. & P. R. Co. v. Perry, 259 U. S., 548, 551 3

Fidelity & Guaranty Co. v. Rainey, 120 Tenn., 357 6

Great Northern Ry. Co. v. Sunburst Oil Refining Co., 287 U. S., 358 4

Lake Charles Planing Mill Co. v. Grand Lodge, 53 So., 550 6

Levering & Carrigues Co. v. Morrin, 289 U. S., 103 3

Love v. McCoy, 94 S. E., 954 6

Murdock v. Memphis, 87 U. S., 590 2

Saunders v. Shaw, 244 U. S., 317 4

St. Louis & F. S. Ry. Co. v. State of Missouri, 156 U. S., 478 3

In the

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE.

May it Please the Court:

We ask leave to file this supplemental brief for the reason that complainant's reply brief discusses the matter of a federal question which was not in its former brief, and for the further reason that, expecting this case to be tried in December, we had very few days in which to prepare our former brief.

(1)

In Determining Whether an Appellant has been wrongfully deprived of a Constitutional Right this Court Will not be limited to a Consideration of the Reasons Assigned by the State Court.

The decision of the Supreme Court of Tennessee construing the Act of 1929 was *directly responsive* to the issue

made in the pleadings and in the assignments of error in that court.

The complaint in this Court is *not of the construction of the Act but of its application to this particular case.*

The question in this Court is: *Was complainant by reason of the application of the Act wrongfully deprived of a constitutional right?*

The Tennessee Supreme Court said in effect that the Act did not impair complainant's contract rights, and it is urged in complainant's second brief that this question of impairment is *the only one* that can be considered by this Court.

It is insisted that this Court must shut its eyes to the circumstance that complainant had sued and recovered on the Act of which it is here complaining because the State Court did not put its decision on that ground.

In *Murdock* v. *Memphis*, 87 U. S., 590, 634, this Court said that it would not be limited to a consideration of the opinion of the State Court, adding:

> "But after all the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry. . . ."

This broad examination is necessary in order that this Court may protect its jurisdiction against imposition.

The question in this Court, we submit, *is whether there has been a wrongful denial and not whether the State Court gave the right reason or the wrong reason or no reason at all.*

Manifestly, if the complainant here cannot upon sound principles of law, complain of the application of this Act—whether for the reason given by the State Court or for any

other reason appearing in the record—complainant has suffered no constitutional wrong.

It has uniformly been held that this Court will determine for itself the substantial merits of such an appeal as this. *St. Louis & F. S. Ry. Co.* v. *State of Missouri*, 156 U. S., 478; *Levering & Carrigues Co.* v. *Morrin*, 289 U. S., 103. And that it will even re-examine the facts where they are so mingled with the claim of a federal right as to make this necessary in order to reach the merits of the application. *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S., 389, 394.

So in *Chicago, R. I. & P. R. Co.* v. *Perry*, 259 U. S., 548, 551, this Court said:

> "So far as can be gathered from its opinion there was no other legal ground upon which the judgment could be supported."

In the instant case the Tennessee Supreme Court found as *facts* in its opinion that complainant had filed its claim under the Act of 1929 and had sued on the bond given under that Act and had recovered and received the proceeds. (Our former brief, p. 2.)

In *City of New Orleans* v. *New Orleans Water Works Co.*, 142 U. S., 79, the City in its answer had claimed that a certain act impaired the obligations of its contract with the Water Company. The State Supreme Court in a majority opinion said nothing about this claim. This Court examined the question *in all of its aspects*, and held that the City could not make the claim because, among other reasons, it had itself *repudiated the contract that it was saying had been wrongfully impaired*—a reason quite analogous to that arising out of complainant's suit on the Act in this case, and a reason that was not given or suggested by the State Court.

It is urged that the State Court did not in terms hold that complainant was precluded because it had sued on the Act, and that this was a non-federal ground and cannot, there-

fore, be considered by this Court, citing *Grayson* v. *Harris*, 267 U. S., 358. That rule, we submit, refers to grounds which have *no relation to the question of federal right.* In the Grayson case the reference was to the state statute of limitations, which was a ground exclusively for the State Court. The merits of that defense had nothing to do with the merits of the federal question.

But here, on the other hand, the complainant is claiming that the Act of 1929 was wrongfully applied to the case, and almost in the same breath is stating that it invoked the Act and sued on it. Manifestly complainant's suing on the Act and its recovery on the refunding bond are not collateral as would be a question of the statute of limitations, but are vital ingredients in the determination by this Court of whether the application of the 1929 Act was wrongful.

(2)

As to the Argument that Complainant, notwithstanding it invoked the 1929 Act, was surprised by the Construction given the Act by the Supreme Court and has therefore the Right to Repudiate the Act.

It is urged (Reply Brief, pp. 3, 4) that complainant was taken by surprise when the Supreme Court construed the 1929 Act as meaning that the taking of a refunding bond would discharge the contract bond.

But the argument of "surprise" is available merely to explain why the federal question was not raised sooner, as is made plain in the passages quoted by counsel from *Saunders* v. *Shaw*, 244 U. S., 317, and *Great Northern Ry. Co.* v. *Sunburst Oil Refining Co.*, 287 U. S., 358.

There is nothing in those cases to support the view that a litigant may sue and recover upon an Act and exhaust its benefits and then later on in the same suit claim that the Act is not applicable to the case.

A litigant *who has the right to assail the constitutionality of an Act* on federal grounds may under the circumstances of the Saunders case be excused for not making the question sooner, but this principle cannot help one who has voluntarily elected to sue and recover on rights given him under the Act and has actually received and appropriated its benefits, and who, therefore, *has not the right to assail the Act.*

And it is to be added that the record shows that there was no "surprise" here in the sense and meaning of the Saunders case. Complainant sued on the bond given under the 1929 Act and was at once notified in appellant's answer of the contention that the taking of the bond under the 1929 Act discharged the contract bond, and by the ruling of the Chancellor that the refunding bond released all rights to the retainage provided for under the earlier Act.

There was, therefore, no surprise unless it be in the fact that the Supreme Court sustained appellee's construction of the Act and not appellant's.

(3)

As to the Argument that Complainant could Recover on and Exhaust the Refunding Bond without Prejudice to its Right to sue on the Contract Bond.

1. Complainant argues (Brief, p. 10) that it had the right to sue on the Act of 1929 and then when it "lost" turn around and sue on the 1917 Act. That might be true if, for a mistake of law, complainant had *lost.* But complainant *did not lose.* Manifestly complainant could not sue and recover on the 1929 Act and then after exhausting the benefits of the Act repudiate it and claim that it was not applicable.

If it was not applicable, complainant had no right to the benefits of it, which nevertheless it received and appropriated. It went forward with the suit and received the pro-

ceeds of the refunding bond with a full understanding of the contention of appellee that the taking of a refunding bond would discharge the contract bond.

2. It is said in the brief (p. 12) that "no objection was raised by the appellant when the Chancellor granted a judgment against the contractor and the appellee." But appellee raised objection, for it had denied liability in its answer (R., 32) and it excepted to the judgment of the Chancellor against it (R., 44) and it assigned errors both in the Court of Appeals (R., 45) and in the Supreme Court (R., 69) on the ground that the taking of the refunding bond discharged the contract bond.

3. Complainant argues that it could sue on the bond issued under the 1929 Act as a "voluntary" bond, citing *Lake Charles Planing Mill Co.* v. *Grand Lodge* (La.), 53 So., 550, and *Love* v. *McCoy* (W. Va.), 94 S. E., 954, and *Fidelity & Guaranty Co.* v. *Rainey*, 120 Tenn., 357. Those cases refer to bonds that were *irregular or not prescribed by statute.* And there was in those cases only one bond. The Courts held that notwithstanding such bond was "irregular" it might be held as a "voluntary" bond.

Those cases are plainly not in point. *There was here no irregular bond.* There was a bond issued pursuant to the Act of 1917 and another issued pursuant to the Act of 1929. *Both were in all respects regular and in exact conformity with the statute.* There was no question that the sureties were bound. The sole question was as to the interpretation of the later Act, as to whether the taking of the later bond discharged the prior bond.

Complainant might have undertaken to question the applicability of the 1929 Act. But it did not. The pleadings and assignments show that the case was tried throughout on the understanding that that Act was applicable.

It is not disputed that the Act of 1929 was constitutional. And when complainant sued and recovered on it, that Act,

with the interpretation given it by the State Supreme Court, became and was as completely applicable as if it had been enacted before complainant's rights arose.

Respectfully submitted,

CHARLES C. TRABUE,
Counsel for Appellee.

WILLIAM HUME,
GEO. H. ARMISTEAD, JR.
Of Counsel.